No. 46215-0-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

LAURI SPANGLER,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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Amended Respondent's Brief

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I. ISSUE

A. Did the trial court impermissibly deny Spangler the right to assert the medical marijuana affirmative defense?

II. STATEMENT OF THE CASE

On January 31, 2011 Lauri[1] Spangler turned in a business license application to the City of Centralia. Ex. 23.[2] Deena Bilodeau, a City Clerk for the City of Centralia, received and processed the applications, which included sending the application to the building department, the police department and pretreatment coordination department. RP 64-66.[3] The application states the name of the business, Hub City Natural Medicine, and its purpose, "Education, sales of natural medicine." RP 65-67; Ex. 23. Spangler signed the application, listed herself as the owner of the business and put her title as "president." Ex. 23. The City of Centralia issued a business license for Hub City Natural Medicine. Ex. 102.

Daniel Mack became involved with Hub City Natural Medicine after meeting Colby Cave at an indoor gardening store. RP 101. Cave told Mack they were opening a medical marijuana dispensary. RP 102. Mack explained that at first Hub City Natural

[1] Ms. Spangler's first name is spelled Lauri. Throughout the pleadings and transcript it is often spelled Laurie.
[2] The State will be filing a supplemental designation of Clerk's papers to include a number of exhibits.
[3] The State will refer to the trial proceedings as RP.

Medicine was only going to be a place where people were taught how to grow marijuana. RP 102. Mack worked at the dispensary for free, he was unemployed at the time and it was something to do, with the understanding that when Hub City Natural Medicine began to make money Mack would be paid. RP 102-03. Mack would take customer's information, verified their cards/authorizations by checking that they were on tamper proof paper and dispensed marijuana and edibles. RP 103, 115, 131. Hub City Natural Medicine was located at 120 South Tower in Centralia. RP 103.

Mack saw Spangler frequent Hub City Natural Medicine. RP 116. Spangler was Cave's girlfriend. RP 104. Spangler would come into the store three to four times per week and knew the store was selling marijuana and edibles. RP 117. Spangler did not handle the marijuana or transactions with clients. RP 137.

The City of Centralia became aware that Hub City Natural Medicine was selling marijuana. RP 145. Centralia Police Sergeant James Shannon contacted Cave outside Hub City Natural Medicine and Cave denied they were selling marijuana, explaining the store educated people on how to grow marijuana. RP 146. Centralia Police Department decided to do an undercover investigation on Hub City Natural Medicine and employ the use of confidential

informants, Devin Edens and Joshua Myers. RP 77-83, 93-96, 146-48, 153.

Edens made a deal with Centralia Police Department to purchase marijuana so he could work past a driving while license suspended charge. RP 77-78. Edens went into Hub City and inquired what he would need to be able to purchase marijuana from the store. RP 79. Edens saw a glass display case with cookies, lollipops and old style candy jars that contained marijuana. RP 79. On April 5, 2011 Edens was given a piece of paper that looked like a marijuana authorization form and went into Hub City and purchased marijuana. RP 79-81. Edens presented his paperwork and his identification to Mack who sold Edens the marijuana. RP 81. Edens made a second purchase of marijuana from Hub City on April 18, 2011. RP 82.

Myers made an agreement with Centralia Police Department to cooperate and purchase marijuana in exchange for consideration regarding his driving while license suspended in the first degree charge. RP 93. Myers was given an authorization form from the police and on April 20, 2011 went to Hub City and purchased marijuana. RP 93-95. Hub City checked for the watermark on the

authorization and took a photocopy of it prior to selling the marijuana. RP 95.

Centralia Police Department executed a search warrant on Hub City. RP 154. The police recovered marijuana, edibles and some used glass smoking devices. RP 158-60. The jars of marijuana suggested a cost per gram and what variety of marijuana it was. RP 168. The police recovered computers and surveillance equipment. RP 170. The police also recovered $1,914 in cash. RP 169.

Centralia Police Chief Robert Berg sent a letter to Hub City, attention Spangler, on March 7, 2011 that it had come to Berg's attention that she planned to use Hub City to deliver marijuana as a medical marijuana dispensary. Ex. 102. Chief Berg warned Spangler that the dispensary was not allowed under state law and that selling marijuana at Hub City would subject her to criminal charges and a revocation of her business license. Ex. 102. Chief Berg also sent Spangler a letter, dated April 22, 2011, notifying her that effective immediately the business license for Hub City was revoked. Ex. 101.

On September 12, 2012 the State charged Spangler with Count I: Maintaining Premises for Using Controlled Substances,

and Count II: Possession of a Stolen Vehicle. CP 1-2. The State later amended the information, removing Count II. CP 23-24. Spangler elected to try her case to a jury and was ultimately convicted as charged. *See* RP; CP 299. The trial court denied Spangler's request to allow her to present a medical marijuana designated provider affirmative defense. RP 233-41. Spangler timely appeals her conviction. CP 380-92.

The State will supplement the facts as necessary in the argument section below.

III. ARGUMENT

A. SPANGLER DID NOT MAKE A PRIMA FACIE SHOWING THAT SHE MET THE ALL OF THE REQUIREMENTS OF THE MEDICAL MARIJUANA AFFIRMATIVE DEFENSE.

Spangler argues that the trial court erred when it denied her the ability to avail herself of the medical marijuana designated provider affirmative defense. Brief of Appellant 9. Spangler claims the trial court improperly weighed the evidence and found that she did not meet the criteria of serving just one patient at a time. Brief of Appellant 9, 14-18. Spangler's argument ignores the trial court's finding that there was no evidence that the marijuana found in Hub City was a 60 day supply and there was no evidence asserting that the customers were qualified patients. The trial court correctly ruled

that Spangler did not meet her obligation under the statutory affirmative defense to make a prima facie showing that she met each of the elements of the medical marijuana defense.

1. Standard Of Review.

Refusal by the trial court to allow a medical marijuana defense is reviewed de novo. *State v. Markwart*, 182 Wn. App. 335, 355, 329 P.3d 108 (2014), *citing State v. Fry*, 168 Wn.2d 1, 10-11, 228 P.3d 1 (2010); *State v. Tracy*, 158 Wn.2d 683, 687, 147 P.3d 559 (2006).

2. The Medical Marijuana Use Of Marijuana Act.

Washington State allows for persons with a debilitating and/or terminal illness to obtain authorization from a medical doctor to use marijuana if that doctor finds that the use of marijuana may benefit the patient. RCW 69.51A.005.[4] This act was known as the Medical Use of Marijuana Act (MUMA).[5] MUMA provides protection for qualifying patients, stating they "shall not be found guilty of a crime under state law for their possession and limited use of marijuana." RCW 69.51A.005. MUMA also extends similar

[4] The statute in effect at the time of the alleged offense was Former RCW 69.51A (2007). This statute was amended in 2011 but that amendment did not take effect until July 2011. All citation to statutory provision found in RCW 69.51A will be to the former statute, enacted in 2007, unless otherwise noted.

[5] MUMA is currently known as the Medical Use of Cannabis Act.

protections to designated providers and health care providers. RCW 69.51A.005.

A person is a qualifying patient if they meet the following criteria:

> (a) Is a patient of a heal care professional;
> (b) Has been diagnosed by that health care professional as having a terminal or debilitating medical condition;
> (c) Is a resident of the State of Washington at the time of such diagnosis;
> (d) Has been advised by that health care professional about the risks and benefits of the medical use of marijuana; and
> (e) Has been advised by that health care professional that they may benefit from the medical use of marijuana.

RCW 69.51A.010(4). MUMA also sets out the requirements for a designated provider. RCW 69.51A.010(1). A designated provider is someone who:

> (a) Is Eighteen years of age or older;
> (b) Has been designated in writing by a patient to serve as a designated provider under this chapter;
> (c) Is prohibited from consuming marijuana obtained for the personal, medical use of the patient for whom the individual is acting as designated provider; and
> (d) Is the designated provider to only one patient at any one time.

RCW 69.51A.010(1).

The people of the State of Washington intended MUMA to be an act of humanitarian compassion towards those who are

suffering a debilitating or terminal illness. RCW 69.51A.005. It was enacted with an understanding that a qualifying patient and his or her doctor should be the ones to determine if medical use of marijuana is the appropriate course of action. RCW 69.51A.005.

3. The Affirmative Defense Available Under The Medical Use Of Marijuana Act.

MUMA "provides an affirmative defense for patients and caregivers against Washington Laws relating to marijuana[.]" *State v. Shepherd*, 110 Wn. App. 544, 549, 41 P.3d 1235 (2002). (2007). MUMA states,

> [i]f charged with a violation of state law relating to marijuana, any qualifying patient who is engaged in the medical use of marijuana, or any designated provider who assists a qualifying patient in the medical use of marijuana, will be deemed to have established an affirmative defense to such charges by proof of his or her compliance with the requirements provided in this chapter. Any person meeting the requirements appropriate to his or her status under this chapter shall be considered to have engaged in activities permitted by this chapter and shall not be penalized in any manner, or denied any right or privilege, for such actions.

RCW 69.51A.040(2).

An affirmative defense admits the defendant committed a criminal act but pleads an excuse for doing so. *Fry*, 168 Wn.2d at 7 (2010)(internal citations omitted). An affirmative defense does not negate any elements of the charged crime. *Id.* The defendant must

prove an affirmative defense by a preponderance of the evidence. *Id.* A preponderance of evidence means after one considers all the evidence the asserted proposition must be more probably true than not true. *Markwart*, 182 Wn. App. at 355.

When asserting the affirmative defense under MUMA a defendant must show, by a preponderance of the evidence, that he or she has met the requirements of MUMA. *Id.* at 354-55. "A defendant is entitled to have a jury consider his defense if he presents sufficient evidence." *Id.* at 355 (citation omitted). A defendant who wishes to raise a medical marijuana defense "bears the burden of offering sufficient evidence to make a prima facie showing." *Id.* (citations omitted). The trial court must interpret this evidence most strongly in favor of the defendant when making its determination. *Id.*

4. The Trial Court Correctly Ruled That Spangler Did Not Make A Prima Facie Showing That She Met The Requirements Of The Affirmative Defense Available Under The Medical Use Of Marijuana Act .

Spangler did not make the requisite showing that she qualified as a designated provider and therefore the trial court correctly ruled she could not avail herself of the affirmative defense set forth in MUMA. To assert the qualified provider affirmative defense Spangler, or Hub City Natural Medicine, shall:

> (a) Meet all criteria for status as a qualifying patient or designated provider.
> (b) Possess no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply; and
> (c) Present his or her valid documentation to any law enforcement official who questions the patient or provider regarding his or her medical use of marijuana.

RCW 69.51A.040(3). Valid documentation is "[a] statement signed and dated by a qualifying patient's health care professional written on tamper-resistant paper, which states that, in the health care professional's professional opinion, the patient may benefit from the medical use of marijuana." RCW 69.51A.010(7)(a). Valid documentation also requires the patient to present proof of identity, which can be a Washington State identification card or driver's license. RCW 69.51A.010(7)(b). A sixty-day supply was defined by Department of Health. RCW 69.51A.080. At the time of this offense the Washington State Department of Health defined a presumptive sixty-day supply as:

> (a) A qualifying patient and a designated provider may possess a total of no more than twenty-four ounces of useable marijuana, and no more than fifteen plants.
> (b) Amounts listed in (a) of this subsection are total amounts of marijuana between both a qualifying patient and a designated provider.
> (c) The presumption in this section may be overcome with evidence of a qualifying patient's necessary medical use.

WAC 246-75-010(3).

Spangler bore the burden of producing, at a minimum, some evidence to support her argument that she was a designated provider who could assert the medical marijuana affirmative defense. *Fry*. 168 Wn.2d at 14. Spangler was required to offer sufficient evidence to support this defense. *Id.* The trial court is required to evaluate the evidence in support of an affirmative defense most strongly in favor of Spangler. *Markwart*, 182 Wn. App. at 355.

Spangler was charged with Maintaining Premises for Using Controlled Substances. CP 22-25. The State was required to show that Spangler acted,

> [k]nowingly to keep or maintain any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place, which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances, or which is used for keeping or selling them in violation of this chapter.

RCW 69.50.402(1)(f). Hub City Natural Medicine held itself out as a medical marijuana dispensary, where they were supplying marijuana to alleged qualifying patients, storing the marijuana and edibles for the sales and allowing patients (and apparently staff) to consume marijuana on the premises. RP 79-81, 95, 104-11, 115-

17, 131-32, 159-60, 168-70, 185. There is no separate rules for a dispensary, if it meets the requirements of the affirmative defense the people involved may avail themselves of the defense. *See* RCW 69.51A; *State v. Shupe*, 172 Wn. App. 341, 356, 289 P.3d 741 (2012).

a. Spangler presented no evidence that Hub City Natural Medicine was in compliance with the statutory requirement to only possess a 60-day supply of marijuana.

The trial court did state it was denying the affirmative defense because it believed Spangler served more than one patient at a time. RP 238-41. The trial court also found that there was no evidence that Spangler possessed only a 60-day supply of marijuana. RP 240. The trial court was correct, there was no testimony that the amount of marijuana the police found at Hub City was a 60-day supply. *See* RP. The first time a 60-day supply is mentioned during the trial was when the trial court made its ruling regarding the affirmative defense. RP 240; *See* RP.

The presumptive 60-day supply is 15 plants and 24 ounces of usable marijuana. WAC 246-75-010(3)(a). While the amount of marijuana tested by the Centralia and Chehalis Police Departments was within that amount (272.5 grams) there were also a number of edibles seized. RP 46-48, 50-61, 105-11, 154-59; Ex. 76, 79.

Edibles are marijuana infused products, such as food, that contain THC. RP 103. The WAC defining 60-day supply only mentions plants and usable marijuana. WAC 246-75-010. The WAC defines usable marijuana as, "the dried leaves and flowers of the *Cannabis* plant family Moraceae." WAC 246-75-010(2)(d). There was no provision for lawfully distributing edibles unless one could quantify what amount of dried leaves were included in any one edible. *See* RCW 69.51A; WAC 246-75-010. Spangler offered no such testimony regarding the quantity of marijuana in each edible. *See* RP.

Spangler did not make a prima facie showing that she met the requirements of the medical marijuana affirmative defense because she did not present any evidence that the amount of marijuana in Hub City Natural Medicine was a 60-day supply for a qualified patient. The absence of any evidence does not meet the preponderance of the evidence standard. *Markwart*, 182 Wn. App. at 355. The trial court included the 60-day supply issue as part of its reasoning for not allowing Spangler to use the affirmative defense. RP 240. Even if the trial court had omitted the lack of evidence regarding a 60-day supply from its oral ruling, this Court will uphold the ruling if it is sustainable on any grounds. *State v. Williams*, 104

Wn. App. 516, 524, 17 P.3d 648 (2001). This Court should affirm Spangler's conviction.

b. Spangler presented no evidence that the customers Hub City Natural Medicine served were qualified patients.

The other reason the trial court gave for not giving the medical marijuana affirmative defense was it believed that there was not a showing that Hub City Natural Medicine served only one qualifying patient at a time. RP 240-41. The trial court stated there was significant questions as to whether what had been presented to the trial court would "get by the issue of whether the person is a qualified patient or not." RP 240-41. The only testimony regarding the qualified patient portion came from Mack when he explained that he took a copy of the authorization form and made sure it was on tamper resistant paper. RP 115-16, 131-32. There was no attempt on Spangler's part to admit the medical marijuana authorizations for the purpose of establishing that Hub City Natural Medicine was complying with the law and only providing marijuana to qualified patients. *See* RP; RCW 69.51A.010(4); RCW 69.51A.040(3). The only authorizations that were admitted were not admitted for the content of the authorizations. RP 200-05; Ex. 86. The trial court, with Spangler's agreement, expressly limited the

scope for which the jury could consider the evidence, to show the documents existed, not for the truth of any statement that appears in the documents. RP 200-05; Ex. 86. Spangler's sole reason for admitting the authorizations was to show that at the time they collected all the designated provider agreements were also collected. RP 202.

Spangler is required to present some evidence that the patients were qualifying patients. She has to make a prima facie showing that she complied with the medical marijuana designated provider statutory requirements. One of those requirements is that she serve as the designated provider for only one **qualified patient** at any one time. RCW 69.51A.010(1). There is an absence of any evidence that the "patients" Hub City served were qualified patients because the authorizations were limited in their scope as to what they could be considered for and Mack only testified that he collected the authorizations and made sure they were on tamper resistant paper. RP 103, 115-16. Spangler did not bring in a custodian of the records in an attempt to have the authorizations admitted through a business records exception. RCW 5.45.020. Nor did Spangler bring in a single customer to show that they were a qualified patient and had presented their authorization to Hub

City. *See* RP. The only "customers" that testified were the State's confidential informants, neither of whom were qualified patients. Therefore, the trial court correctly ruled that Spangler did not make a prima facie showing that Hub City served only one qualified patient at any one time. Therefore, this Court should affirm Spangler's conviction.

c. *Shupe* was wrongly decided and this Court should not follow Division III's analysis of the meaning of one patient at any one time.

Division III has held that under the medical marijuana statutory scheme the wording, "one patient at any one time" means that successive deliveries to different patients would not violate the statute because the person is only serving one patient at a time. *Shupe*, 172 Wn. App. at 353-56. The State respectfully argues Division III's reading of the statute is incorrect, and that one qualified patient at any one time does not allow for a person, or dispensary, to provide marijuana to multiple patients in succession. This result does not make sense when one reads the statute in its entirety, including the requirement that a qualified provider not have more than a 60-day supply of marijuana for their qualified patient. RCW 69.51A.010(1); RCW 69.51A.040(3).

Shupe was running a medical marijuana dispensary in Spokane. *Shupe*, 172 Wn. App. at 344. Shupe, who apparently admitted he manufactured, possessed and sold marijuana, argued he only served one patient at any one time. *Id.* 349, 353-56. Division III held "'to only one patient at any one time' means one transaction after another so that each patient gets individual care." *Id.* at 356. The reasoning behind this is the analysis of the word "at" and deciding it took on a sense of immediacy and any ambiguity, under the rule of lenity, must be resolved in Shupe's favor. *Id.* at 354.

A dispensary would be required to only have a 60-day supply of marijuana for ONE qualified patient on its premises at any one time to comply with the plain language of the statute. RCW 69.51A.040(3). A presumptive 60-day supply was 24 usable ounces and 15 plants. WAC 246-75-010(3). The statute does not contemplate a dispensary scheme, if it did it would allow for more than 24 ounces of marijuana to be available so a dispensary could serve multiple patients and provide them each a 60-day supply of marijuana should they request it. RCW 69.51A; WAC 246-75-010(3). But the statute does not allow for a larger quantity than a 60-day supply for one patient. *Shupe* was wrongly decided and this

Court should hold that under the statuory scheme in place at the time of this offense, Spangler was only able to serve one qualified patient and that "at any one time" does not allow for successive qualified patients to receive marijuana from a single designated provider.

IV. CONCLUSION

Spangler did not meet her burden to make a prima facie showing that she complied with all of the requirements of the medical marijuana designated provider affirmative defense. Absent the prima facie showing the trial court correctly ruled that Spangler could not avail herself to the defense. This Court should affirm Spangler's conviction for Maintaining Premises for Using Controlled Substances.

RESPECTFULLY submitted this 11th day of December, 2014.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by:_____
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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. LAURI SPANGLER, Appellant.	No. 46215-0-II DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On December 9, 2014, the appellant was served with a copy of the **Amended Respondent's Brief** by email via the COA electronic filing portal to Lise Ellner, attorney for appellant, at the following email address: Liseellnerlaw@comcast.net.

DATED this 11th day of December, 2014, at Chehalis, Washington.

Sara I. Beigh, WSBA No. 35564
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

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